



RIGHTS STUFF

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Court Overrules West Virginia Human Rights Commission

Nabil Akl is a United States citizen who was born in Lebanon. In 1998, Ford Motor hired him as a customer service representative. By 2005, Mr. Akl was a dealer services supervisor in Huntington, West Virginia, supervising twelve other employees.

Ford sent out anonymous surveys to employees at its branches and learned many employees were not happy with their work environment at the Huntington branch. They sent two people from human resources to talk to employees confidentially, and learned that Mr. Akl frequently used offensive comments in the workplace. He allegedly complained about women telling him what to do, made jokes about homosexuals, imitated people with mental disabilities and made a number of sexually-explicit comments.

The human resources employees talked to Mr. Akl, who largely denied the allegations or minimized them, but did admit to some of the allegations. He was suspended and given a week to provide a written statement regarding the allegations against him. He did not submit a statement. Ford decided to reprimand him and demote him, although his salary and benefits were not affected. The same day, Ford reprimanded Mr. Akl's supervisor for not taking sufficient

action to address Mr. Akl's language in the workplace.

A few hours after Mr. Akl was demoted, he complained to human resources that the disciplinary process was not fair and that he had been the victim of derogatory ethnic comments at the branch. He was told he could challenge the discipline process through the company's review process, and that someone would be back in touch with him about the ethnic comments. When human resources representatives called Mr. Akl the next day to talk about the ethnic comments, he said he wanted to talk about his reprimand and demotion. They explained to him the review process for the discipline and tried to get specifics about the ethnic comments. Mr. Akl said he would provide specifics only if doing so would change his discipline; when he was told it would not, he refused to provide specifics and resigned.

Mr. Akl then filed a discrimination complaint with the West Virginia Human Rights Commission, alleging disparate treatment, a hostile work environment and constructive discharge. The WVHRC held a hearing during which Mr. Akl said that he was not the only employee who used profanity at work and that he had been

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Attendance is an Essential Job Requirement for a Neo-natal Intensive Care Nurse

Monika Samper was a neo-natal intensive care nurse with Providence St. Vincent Medical Center. She was specially trained to take care of premature babies. Given the patients her unit cares for, it's critical that the unit not be understaffed. Not having sufficient nurses on duty is, according to the hospital, "highly undesirable and potentially can compromise patient care."

Providence allows its employees to have up to five unplanned absences of unlimited duration a year, as well as other permitted absences. Samper has fibromyalgia, a condition that limits her sleep and causes her chronic pain. She routinely missed more work than the policy allowed. After years of citing her for attendance problems, the hospital agreed to let her call in sick when she was having a bad day and move her shift to another day in the week. She did not have to find a replacement. When that arrangement did not improve her attendance, she was allowed to work only two shifts a week, never on consecutive days. When this policy did not result in her improving her attendance, she asked to be exempt from the attendance policy altogether as an accommodation for her disability. Not surprisingly, neither the hospital nor the Court agreed that this was a

reasonable accommodation under the Americans with Disabilities Act (ADA).

The Court agreed that Samper was a person with a disability. But one of the essential functions of her job was to comply with the hospital's attendance policy. Quoting another case, the Court said that it is a "rather common-sense idea . . . that if one is not able to be at work, one cannot be a qualified individual."

Regular attendance at work might not be an essential function of all jobs, but it is for a neo-natal nurse. The Court said that her "at-risk patient population cries out for constant vigilance, team coordination and continuity." The Court said that Samper was essentially asking for "an open-ended schedule that would allow [her] to come and go as [s]her pleases," which is not a reasonable accommodation in her case.

Samper argued that if the hospital is able to accommodate five unplanned absences a year, it can accommodate an unlimited number of absences for her. The Court disagreed, saying that the hospital "endeavored to balance the realities of illness, family matters and other unplanned emergencies faced by its employees against the vital demands of critical infant care, by limiting the overall number of

absences." The Court said that to require the hospital to provide accommodations that compromise performance quality "could, quite literally, be fatal."

The case is Samper v. Providence St. Vincent Medical Center, 675 F. 3d 1233 (9th Cir. 2012). If you have questions about your rights and responsibilities under the ADA, please contact the BHRC.





Are Voting Machines Subject to the ADA

The American Association of People with Disabilities sued Katherine Harris, then the Florida Secretary of State, and the State of Florida in 2000. The AAPD alleged that Ms. Harris and the state had violated the Americans with Disabilities Act and other laws by not providing accessible voting machines to voters with disabilities.

The plaintiffs alleged "that due to the lack of handicapped-accessible voting equipment, they could not - unlike non-disabled citizens - cast a 'direct and secret ballot.'" They had to rely on third parties to mark their votes accurately, denying them the right to vote "secretly and directly" as provided by the state constitution. They said that when Florida bought new

voting machines, they had "altered a facility," and under the ADA, when governments alter facilities, they have to do so in a way that improves accessibility. But the new machines did not improve accessibility.

The litigation wound its way back and forth through the system for years. Lower courts held that "third party assistance was consistent with casting a 'direct and secret ballot.'" And in July of 2011, the Eleventh Circuit Court of Appeals held that a voting machine is not a "facility" for purposes of the ADA. In so doing, the Court relied on department of justice regulations that suggest that only physical structures and the permanent objects affixed to those structures

are "facilities" subject to the ADA. Courts have held that ATMs and ticket booths are facilities, but a voting machine is different. It's in the building only temporarily, and it is not affixed to a structure.

However, the Court noted that the Help America Vote Act, which was enacted into law in 2002, requires states to provide a voting system that is "accessible for individuals with disabilities . . . in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters. Under the law, each polling place must have at least one handicapped accessible voting machine. The Plaintiffs therefore will be able to use accessible voting machines, just not under the guise of [the ADA]."

BHRC Issues Hate Incident Report

The BHRC, responsible for gathering data and issuing reports on local hate incidents, has released its latest report. This report includes 11 reported incidents from July 2011 through June 2012. The report is available for the public upon request and online at www.bloomington.in.gov/bloomington-human-rights-commission.

Barbara McKinney, director, emphasized that the number collected each year is reflective only of those incidents that were reported, which may not be a comprehensive count. Still, she said the fact that the number is lower than in the two previous annual

reports (18 and 26, respectively) is encouraging. "The report is the best gauge of hate incidents we have, but it is never possible to determine a completely accurate number," said McKinney. "We use the report to get a general sense of what is happening in the community with respect to these types of activities."

As is always the case, the hate incidents described in this report take a variety of forms, including verbal harassment, threats of physical harm, actual physical harm and vandalism. McKinney said that while incidents vary in degree of severity, in each case the victim was concerned enough to reach out for help.

The report also addresses the apparent motivations behind each report. Seven of the incidents were apparently motivated by racial bias, two by religious bias, one by bias against gays and lesbians and one by racial and/or sexual bias.

The BHRC receives its reports from a variety of sources, including the Bloomington Police Department, news reports and individuals. People who are victims of hate incidents are urged to report the incident to the police by calling 911 or to the BHRC by calling 349-3429 or e-mailing human.rights@bloomington.in.gov. The BHRC accepts anonymous reports.



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subjected to regular derogatory comments from employees and clients. One co-worker, for whom Mr. Akl had been best man at his wedding, testified that he had heard people refer to Mr. Akl as "towel head," "Al Qaeda" and "camel fornicator." Other witnesses supported Ford's view, that Mr. Akl's use of profanity far exceeded the other employees and that they had never heard any ethnic slurs directed at Mr. Akl.

The WVHRC found for Mr. Akl, saying he had proven his case of disparate treatment, hostile work environment and constructive discharge. It ordered Ford to pay his \$5,000 for incidental damages, \$624,654 in lost earnings and \$31,250 in costs. Ford appealed this decision to the courts and won.

The Court said that Mr. Akl had shown that he was a member of a protected class, because he is from Lebanon, that he suffered an adverse employment action and that other, non-Lebanese employees had used profanity at work without being disciplined. But, the Court said that Ford had established legitimate and nondiscriminatory reasons for demoting him, given that nine employees said he used particularly abusive language and given that he admitted some of the allegations. The allegations about the other employees' use of profanity showed their use was much less pervasive than his. Ford showed that it had terminated non-minority employees for using offensive language at other branches.

Nor could the Court accept Mr. Akl's claim that Ford had tolerated a hostile work environment by not taking action against the ethnic slurs. His own testimony showed that the comments were welcome, part of the teasing and bantering in the office that he participated in. Even if the comments were unwelcome, he failed to inform Ford about them until after he himself was reprimanded and demoted, and did not give specifics even then.

Nor could the Court accept Mr. Akl's claim that he had been constructively discharged when Ford failed to correct the hostile environment. Mr. Akl did not give Ford the time or information necessary to correct the allegedly hostile environment before he quit.

The case is Ford Motor Credit Company v. West Virginia Human Rights Commission, 2010 WL 1838393 (Supreme Court of Appeals of West Virginia, 2010).

City of Bloomington Council for Community Accessibility Seeks Nominees for Annual Awards

The City of Bloomington's Council for Community Accessibility (CCA) is accepting nominations for its annual awards ceremony. The awards recognize individuals, businesses and organizations that make the community more accessible for people with disabilities. The CCA advocates on behalf of people with disabilities, promoting awareness and working to develop solutions to problems of accessibility in the community.

"Through the hard work of the CCA and community members, Bloomington continues to improve its accessibility to individuals with disabilities," said Mayor Mark Kruzan. "I look forward to events that recognize the time, effort and commitment of people who are constantly working to better their community."

Award categories include:

- Kristin Willison Volunteer Service Award
- Business Service Award
- Professional and Community Service Award
- Housing Service Award
- Self-Advocacy
- Mayor's Award

Nominations may be submitted online at www.bloomington.in.gov/cca. The deadline for submitting nominations is October 12, 2012. For information about award nominations or the CCA, contact Craig Brenner, Special Projects Coordinator for CFRD, via e-mail at brennerc@bloomington.in.gov or by phone at 349-3471.